Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1491

JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, *et al.*,

(Complete Title on Inside Cover)

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

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IN THE

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No._____

JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, JOHN L. CONNOLLY, HAROLD EDWARDS, HOWARD C. DENNIS, DONALD E. MIER, ALEXANDER RADOS, WILLIAM SCHMIDT, WILLIAM C. WAGGONER, JERALD B. LAIRD and RICHARD GANNON, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund; JOSEPH H. SEYMOUR, JOHN L. CONNOLLY, RICHARD L. CORBIT, C. V. HOLDER, HAROLD EDWARDS, HOWARD C. DENNIS, DONALD E. MIER, JAMES J. KIRST, WILLIAM C. WAGGONER, JOHN C. MAXWELL, C. WILLIAM BURKE, RICHARD GANNON, KENNETH J. BOURGUIGNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; JOSEPH H. SEYMOUR, HOWARD C. DENNIS, RICHARD L. CORBIT, C. WILLIAM BURKE, HAROLD EDWARDS, ALEXANDER RADOS, DONALD E. MIER, C. IRWIN T. JOHNSON, WILLIAM C. WAGGONER, JAMES J. KIRST, RICHARD GANNON and JERALD B. LAIRD, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; JOSEPH H. SEYMOUR, ALEXANDER RADOS, RICHARD L. CORBIT, WILLIAM SCHMIDT, RICHARD GANNON, HOWARD C. DENNIS, JERRY TRENT, ROBERT R. MOODIE, ALAN ROBERTS, C. IRWIN T. JOHNSON, A. PAUL SCHENK and HAROLD EDWARDS, each in his respective capacity as Trustee of the Southern California Operating Engineers Apprentice Training Trust,

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the above named Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Southern California Operating Engineers Apprentice Training Trust, join herein and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 5, 1979, in Case No. 76-3701 of that Court.

Opinions Below.

The opinion of the Court of Appeals is reported at 609 F.2d 346 and appears at Appendix A of this petition. The findings of fact and conclusions of law made by the U.S. District Court for the Central District of California are not officially reported and appear at Appendix B of this petition. The judgment granting motion for summary judgment filed and entered in the district court is not officially reported and appears at Appendix C of this petition.

Jurisdiction.

The opinion of the Court of Appeals was filed on October 5, 1979. Upon the filing of a timely petition for rehearing and suggestion for a rehearing *en banc* by the petitioners, the Court of Appeals filed an order on December 28, 1979, denying the petition for rehearing and rejecting the suggestion for rehearing *en banc*. The order filed December 28, 1979, appears at Appendix D of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. May a collective bargaining agreement automatically expire by its own terms without a written notice from one party to the other at least sixty days in advance as required by section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d)?

2. Was summary judgment that the collective bargaining agreement automatically expired erroneously granted when extrinsic evidence showed that the collective bargaining agreement was intended to remain in effect unless Local 12 or Coughlin Company gave written notice to the other at least sixty days before the end of the term of the related Master Labor Agreement?

Statutes Involved.

The first question presented by this petition involves section 8(d) of the National Labor Relations Act, 61 Stat. 142-143, 29 U.S.C. §158(d), which provides in relevant part:

> " . . . [W]*here there is in effect a collective-bargaining contract* covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract, unless the party* desiring such termination or modification —
>
> (1) *serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,* or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) *offers to meet and confer* with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) *notifies the Federal Mediation and Conciliation Service* within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later; . . .*'' (Emphasis added.)

Statement of the Case.

The jurisdiction of the district court was invoked to enforce obligations to pay fringe benefit contributions under a collective bargaining agreement as authorized by section 301(a) of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a).

In 1967, respondent Coughlin Company (''Coughlin'') executed a ''short form'' collective bargaining agreement with the International Union of Operating Engineers, Local Union No. 12 (''Local 12''). The short form agreement incorporated substantially all of the terms, including those governing fringe benefit contributions, of the Master Labor Agreement (''MLA''), a multiple employer collective bargaining agreement negotiated between Local 12 and the Southern California General Contractors Associations (''Associations''). The MLA had a term of four years to July 1, 1969, and from year to year thereafter unless one

party gave to the other a written notice sixty days in advance of its desire to ''change, amend, modify or terminate'' the MLA.

More than sixty days prior to July 1, 1969, Local 12 gave timely written notice to the Associations of its desire to negotiate modifications to the terms of the MLA. *Neither Local 12 nor Coughlin gave written notice to the other party of a desire to terminate or modify the short form agreement between them. App.* A, p. 2. *App.* B, p. 12.

Petitioners, the joint labor-management boards of trustees of the Operating Engineers Trusts (''Trustees''), filed this action on March 25, 1975, in the district court to enforce payment of contributions due to the Trustees under Coughlin's collective bargaining agreement. Coughlin's answer to the complaint raised eleven affirmative defenses, including an allegation that the collective bargaining agreement ''was cancelled and rescinded . . . in approximately August of 1968,'' RA:42, lines 11-14.[1] In pretrial preparation, Coughlin raised a contention that its short form agreement did not incorporate the MLA as modified effective June 30, 1969. RA:92-93. The pretrial conference order prepared jointly by the parties and signed by the district court on July 20, 1976, preserved the question whether in the absence of Coughlin providing Local 12 a sixty day written notice of termination of the shortform agreement, the short form agreement continued to incorporate by reference the terms of the MLA in effect from July 1, 1969, through July 1, 1974. RA:107, lines 25-30.

After the pretrial conference, the parties stipulated, and the district court ordered, that motions for summary judgment be filed. RA:111-113.

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[1] ''RA:'' references are to the Record on Appeal in the Court of Appeals, followed by designation of page and lines.

The Trustees then filed a motion for summary judgment, relying on the language of the short form agreement, but also relying on extrinsic evidence that the agreement remained in effect and incorporated the terms of the modified MLA in the absence of a written notice of termination by Coughlin or Local 12 to the other. The extrinsic evidence included:

(1) An admission in deposition testimony by D.W. Coughlin, president of Coughlin Company, to the effect that the "short form" agreement remained in effect on July 27, 1970; RA:136, lines 3-12.

(2) The affidavit of a Local 12 official establishing that Local 12 is party to short form agreements similar to Coughlin's with numerous other employers, that such employers remain bound to the agreement unless a timely notice of termination is given by the employer to Local 12, and that no written notice of termination was received by Local 12 from Coughlin; RA:151, lines 24-32; 152, lines 1-5.

(3) The affidavit of the Trustees' administrator establishing that in August, 1970, Coughlin filed a written report with the Trustees showing employment of an operating engineer under the "short form" agreement during the months of October, November and December, 1969, and paid contributions to the Trustees at the increased hourly rates established by the modified MLA in effect at that time; RA:135, lines 15-27; 261; 393, lines 13-22.

These facts are uncontroverted in the record.

At the hearing on the motions for summary judgment, the district court stated a tentative ruling that the short form agreement automatically expired on June 30, 1969, even in the absence of a written notice of termination sixty days in advance. The district court then allowed seven days within

which the Trustees might file objections to the findings of fact and conclusions of law proposed by Coughlin. TR:16, lines 15-25; 17.[2] The Trustees filed timely objections to the proposed findings and conclusions, requested a further hearing on the findings and conclusions (RA:429, line 15; 430, lines 1-5), and provided a full briefing of section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d). RA:436-438. The district court held no further hearing, but prepared its own findings and conclusions, adopting certain of the Trustees' proposals and rejecting others. The district court found that neither Local 12 nor Coughlin had given written notice to the other of a desire to terminate or modify the short form agreement (*App*. B, p. 12) and, in addition, found that after July 1, 1969, Coughlin requested that Local 12 dispatch a workman to Coughlin, and Coughlin thereafter reported hours and paid contributions to the Trustees on behalf of that workman in accordance with the modified MLA then in effect. *App*. B, p. 12. However, the district court concluded that the short form agreement automatically expired on June 30, 1969, because the MLA was modified in negotiations and, therefore, was "new" and not a "renewal or extension" of the MLA. *App*. B, pp. 13-14. Judgment was entered accordingly.

The Court of Appeals affirmed, refusing to reach the merits of the effects of section 8(d) of the NLRA on expiration of the collective bargaining agreement without a notice of termination on grounds that section 8(d) had not been raised timely in the district court. *App*. A, p. 3. The Court of Appeals then proceeded to construe the short form agreement as if the Trustees relied only upon the language

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[2] "TR:" references are to the court reporter's official transcript of proceedings in the district court, followed by designation of page and lines.

of the agreement itself, and found insufficient basis in that language to disagree with the interpretation reached by the district court.[3] The Court of Appeals agreed with the district court's ''more reasonable'' interpretation of the short form agreement ''although the parties could perhaps have more clearly expressed their intent'' (*App*. A, pp. 6-7), and distinguished other cases involving similar short form agreements with automatic renewal provisions. *App*. A, pp. 8-10. The Court of Appeals then merely mentioned the conduct of Coughlin in continuing to observe the terms of the modified MLA after July 1, 1969, as ''not sufficient to demonstrate that the district judge erroneously construed the agreement.'' *App*. A, p. 10.

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[3]Article II of the short form agreement provides in part:

''The EMPLOYER, not being signatory to any recognized Operating Engineers multiple-employer agreement, hereby *agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements* applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed *as recognized, modified and renewed from time to time* through collective bargaining between the UNION and the applicable multiple-employer group.'' (Emphasis added.)

Article V of the short form agreement provides:

''This Agreement shall become effective as of the date shown above and *shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof, unless either party shall given written notice to the other party*, at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.'' (Emphasis added.)

REASONS FOR GRANTING THE WRIT.

In concluding that the existing collective bargaining agreement automatically expired without a written notice of intent to terminate or modify given by one party to the other at least sixty days in advance, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; and, the Court of Appeals' decision of that important question of federal law is based upon reasoning which seriously conflicts in principle with applicable decisions of this Court. Review of the Court of Appeals' decision should be granted for these reasons, as discussed below:

1. This Unprecedented Holding That a Collective Bargaining Agreement Expired Automatically, Without Written Notice From One Party to the Other and Despite Subsequent Compliance With Its Terms, Severely Disrupts the Stability of Existing Labor Contracts.

The decision of the Court of Appeals overturns long standing practices and stable contractual relations between many labor unions and tens of thousands of employers in California alone, as well as throughout the Ninth Circuit and the reaches of its influence in the nation. Without considering the merits of a federal statute expressly controlling the subject [29 U.S.C. §158(d)], the Court of Appeals held that a ''short form'' collective bargaining agreement of the type commonly used by many labor unions expired and became a nullity without either party giving to the other a written notice of termination. Local 12 alone has such agreements with approximately 5,000 employers, and under the Court of Appeals' decision Local 12 would be faced with signing new agreements with each employer at least initially and, for added assurance, whenever the MLA is modified.

Other labor unions can take little comfort in the particular language of their own short form agreements, because the Court of Appeals, in truth, swept aside the logical interpretation incorporating the MLA "as recognized, modified and renewed from time to time" in favor of an interpretation designed to protect the employer from being bound to terms yet to be negotiated by the employer associations.

The disruption of stable labor relations would be *retroactive*, as in this case, as well as prospective. Collective bargaining parties who have considered themselves bound and covered continuously by short form agreements signed many years ago would have those agreements expunged and invalidated retroactively at the first date on which the incorporated master labor agreement was modified. One important effect of such a result is that fringe benefit contributions paid to Taft-Hartley trusts during past years will have been made without the statutorily required coverage of a written collective bargaining agreement, thereby making unlawful the payment of benefits to the employees involved. *Walsh v. Schlecht*, 429 U.S. 401, 407, 97 S.Ct. 679, 684 (1977). The decision below will cause great expense and labor strife in signing new short form agreements, and will add new caseload burdens as parties seek to litigate an issue previously regarded as settled.

2. This Court Should Not Permit the Court of Appeals' Decision to Stand at Cross Purposes With the Explicit Provisions of Section 8(d) of the National Labor Relations Act.

This Court has said that a collective bargaining agreement ". . . must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 279, 76 S.Ct. 349, 356 (1956). The law relating to termination of collective bargaining

agreements when Coughlin signed the short form agreement included section 8(d), which this Court has construed as follows:

> "[T]he party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations." *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187, 92 S.Ct. 383, 401-402 (1971).

The Court of Appeals construed the short form agreement as having expired automatically without any of these things being done, thereby giving the words of the agreement a clearly unlawful meaning. In contrast, this Court has interpreted such labor agreements by applying the "general rule of construction [which] presumes the legality and enforceability of contracts", stating:

> ". . . ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh v. Schlecht, supra*, 429 U.S. 408, 97 S.Ct. 685.

Rather than apply these rules, the Court of Appeals refused to consider the merits of whether section 8(d) of the NLRA will permit a collective bargaining agreement to expire without a timely written notice on grounds that Coughlin "may" have been prejudiced by the Trustees' failure to raise the statute at an earlier point in the district court proceedings. In so ruling, the Court of Appeals relied primarily on *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978), which concerned an issue never raised in the lower court and, more importantly, involved a completed jury trial in a criminal case. In contrast, the Trustees fully briefed the section 8(d) issue in the district court after a tentative ruling

on summary judgment indicated that extrinsic evidence of contractual intent would be ignored and before the district court's consideration of findings and conclusions. Coughlin could not be prejudiced by consideration of section 8(d) in the district court, in the Court of Appeals or in this Court. A private party is not entitled to be free from the requirements and policy of a federal statute and, therefore, can suffer no prejudice by the proper application of that law. Adjudicative facts "not subject to reasonable dispute" must be judicially noticed "at any state of the proceeding" [F.R.Evid., Rule 201(f)], including original judicial notice in the appellate court. 10 *Moore's Federal Practice* §201.60. *Weinstein's Evidence,* ¶201[06]. The courts have at least equal access to consideration of federal statutes. 10 *Moore's Federal Practice* §201.02[1].

Even in the absence of the district court's reversible error in disregarding the extrinsic evidence of contractual intent, a trial court is not entitled to disregard controlling provisions of federal statutes reflecting important public policy when the court has not yet completed findings of fact and conclusions of law or entered judgment. Particularly this is so in the context of summary judgment proceedings, when there has been no trial testimony of live witnesses and Coughlin has presented no evidence except an unrelated declaration of counsel. RA: 426.

Most importantly, published precedent holding that an existing collective bargaining agreement has expired and become a nullity without written notice of termination between the parties should not be permitted to stand if a federal statute expressly prohibits that result. If, indeed, section 8(d) does require a written notice to terminate the short form agreement, the Court of Appeals decision undoubtedly encouraging many parties to conduct themselves otherwise cannot be justified. By failing to consider section 8(d), the

decision of the Court of Appeals *at least* runs the risk of acting directly at cross purposes with a federal statute which is a cornerstone of stability in collective bargaining relations.

3. The Trustees Presented Uncontroverted Extrinsic Evidence in the District Court Proving That the Short Form Collective Bargaining Agreement Was Intended to Remain in Effect, Despite Modification of the Master Labor Agreement, Unless Coughlin Gave Timely Written Notice of Termination.

This Court has held, regarding the proper approach to interpreting a collective bargaining agreement, as follows:

> "In order to interpret such an agreement, it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transportation-Communication Employees Union v. Union Pacific Railroad Company,* 385 U.S. 157, 161, 87 S.Ct. 369, 371 (1966).

Therefore, in moving for summary judgment in the district court, the Trustees did not rely solely upon the plain language of the short form agreement to establish that the agreement remained in effect after July 1, 1969. The Trustees presented extrinsic evidence of the intent, practices and customs of the parties regarding that issue as follows:

(1) The admission in deposition testimony by Coughlin's president and principal stockholder, who signed the short form agreement, that the agreement was still in effect on July 27, 1970, and that Coughlin was still obligated then and thereafter to pay contributions to the Trusts on its operating engineer employees. RA:136; Deposition of Donald Wallace Coughlin taken on July 15, 1975, p. 16.

(2) The affidavit of the Trustees' administrator establishing that Coughlin reported an employee to the Trustees after July 1, 1969, and paid contributions on that employee at the increased rates set by the terms of the modified MLA. RA:250, lines 12-18; *App.* A, p. 2.

(3) The affidavit of a Local 12 official establishing that Local 12 has many similar short form collective bargaining agreements with other employers, and the practice of the parties to those agreements is to treat the agreements as continuing in effect after modification of the incorporated MLA unless the employer signatory to the short form agreement has given a timely written notice of termination to Local 12. RA:151-152.

Such practices and intent under short form agreements have often been reflected in reported decisions of the courts. *Waggoner v. C & D Pipeline Company*, 601 F.2d 456, 457 (9th Cir. 1979); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1108, 1114 (9th Cir. 1979); *Local Union No. 428 v. Silva*, 96 Cal.App.3d 751, 754-55, 158 Cal.Rptr. 78, 81 (1979).

In addition, the views of the Trustees themselves, one-half appointed by Local 12 and one-half appointed by employer associations, should be treated as extrinsic evidence that short form agreements negotiated by Local 12 are intended and treated as continuing in effect after modification of the MLA. The Court of Appeals treated the views of the Trustees as merely the "Union's contention" (*App.* A, p. 10), while such views should be accorded at least evidentiary significance, if not the deference shown for the views of joint grievance committees. *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S.Ct. 363, 372 (1964); *General Drivers, etc., Local Union No. 89 v. Riss & Co.*, 372 U.S. 517, 519, 83 S.Ct. 789, 791 (1963).

The Court of Appeals failed to consider this extrinsic evidence as required for interpreting the collective bargaining agreement or in the proper context of reviewing summary judgment.

> "[In] reviewing a summary judgment, we need decide only whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied." *Inland City Express, Inc. v. Diamond National Corporation*, 524 F.2d 753, 754 (9th Cir. 1975).

The Court of Appeals did not deal at all with determining whether the extrinsic evidence of proper contract interpretation was sufficient to raise a genuine issue of material fact requiring a trial.

By dealing only with the wording of Article II of the short form agreement, the Court of Appeals arrived at a truly nonsensical interpretation: that it is Local 12's territory or jurisdiction, or both, and not the MLA, that is to be "recognized, modified and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group".

In its concern for adopting a contractual interpretation which would protect Coughlin from "purchasing 'a pig in a poke' " (*App.* A, p. 6), the Court of Appeals failed to recognize the very astute business reasons why an employer chooses to sign a short form agreement incorporating the MLA which is to be renegotiated. The short form employer signs his collective bargaining agreement in advance and thereby shields his own company from work stoppages during the renegotiation of the MLA, while still being assured of receiving the most favorable terms that the employer associations can negotiate with Local 12.

Conclusion.

The petition for a writ of certiorari should be granted.

March 1980.

Respectfully submitted,

WAYNE JETT,

Counsel for Petitioners.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Joseph H. Seymour, etc., et al., Plaintiffs-Appellants, vs. Coughlin Company, a California corporation, Defendant-Appellee. No. 76-3701.

Filed: Oct. 5, 1979.

Appeal from the United States District Court For the Central District of California.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

WALLACE, Circuit Judge:

Trustees of various pension funds and trusts appeal from a summary judgment entered against them by the district court in their action, as third party beneficiaries, for breach of contract against Coughlin Company (Coughlin). The trustees contend that the district judge improperly failed to follow the statutory mandate of the National Labor Relations Act, and improperly construed the collective bargaining agreement between the International Union of Operating Engineers, Local Union No. 12 (the Union) and Coughlin. We affirm.

I

In 1967, Coughlin executed a "short form" collective bargaining agreement with the Union. The short form agreement incorporated substantially all of the terms, including those governing pension fund contributions, of the Master Labor Agreement (MLA), a multiple employer collective bargaining agreement negotiated between the Union and several Southern California general contractors' associations (contractors). The MLA had a term of four years and was to expire on July 1, 1969. Coughlin was not a party to the

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*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

MLA at the time it executed the short form agreement with the Union.

In accordance with the terms of the MLA, the Union gave timely written notice to the contractors of its desire to negotiate modifications to the terms of the MLA. Neither the Union nor Coughlin gave written notice to the other party of a desire to terminate or modify the short form agreement between them.

The district judge found that the contractors and the Union "entered into a new and different [MLA] for the period 1969-1974 which substantially changed, modified and amended the prior [MLA]." The district judge also found that after the July 1, 1969, expiration of the original MLA, Coughlin requested the Union to dispatch a worker to it. The Union did so, and Coughlin later reported hours of employment, and paid fringe benefit contributions on behalf of the worker to the trustees for the period October-December 1969. Coughlin paid these contributions pursuant to the provisions of the modified, 1969-1974 MLA which was then in effect.

The district judge concluded that, because neither party to the short form agreement had given notice of intent to terminate or modify it, the agreement "was effective by the provisions of its Article V for the term of the MLA 1965-69 and any 'renewals or extensions' thereof." Pursuant to his finding that the modified, 1969-1974 MLA was "new and different," the district judge concluded that the original MLA was not extended or renewed, and that the short form agreement terminated simultaneously with the original MLA on July 1, 1969.

The trustees contend that the district judge erred because he failed to give effect to the alleged mandate of section 8(d) of the National Labor Relations Act (Act), 29 U.S.C.

§158(d), and because he allegedly misconstrued the termination provision of the short form agreement.

II

The trustees argue that section 8(d) of the Act effectively prevents termination of any collective bargaining agreement until one of the parties to such an agreement serves a written notice of termination upon the other party in accordance with that section. Because it was not timely raised, however, we do not reach the merits of this argument. As the trustees concede, they did not present this argument to the district judge in any form until, after the district judge had already tentatively ruled in the case, they filed their objections to the proposed findings of fact and conclusions of law. The section 8(d) issue was not included in the pretrial conference order. Neither did the trustees make any motion to amend this order. Coughlin had no meaningful opportunity to argue the question in the district court and the district judge thus appropriately chose not to rule on the issue. *See* Fed. R. Civ. P. 16.

"As a general rule, 'a federal appellate court does not consider an issue not passed upon below.' " *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). *Accord, e.g., Roberson v. United States*, 382 F.2d 714, 718 (9th Cir. 1967). *See also McCaffrey v. Diversified Land Co.*, 564 F.2d 1241, 1243-44 (9th Cir. 1977) (per curiam). While we have recognized a number of exceptions to this rule, none is applicable here.

In *Patrin*, we observed that where a recent change in the law results in a new theory or issue to be asserted, we may, in our discretion, allow a party to raise that theory or issue in the interests of justice. 575 F.2d at 712. Section 8(d), however, is not of recent origin, nor is there a recent change

in its interpretation pertinent to the issues involved in this case.

We stated in *Patrin* that we also may consent to consider an issue which "is purely one of law and either does not affect or rely upon the factual record developed by the parties." *Id.* Although the question at issue here does appear to fit this guideline, we emphasized in *Patrin* that this exception is inapplicable when the party against whom the issue is raised may be prejudiced by it. "Thus, if he might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue," we should not consider a theory or issue not properly raised in the district court. *Id.* As the arguments before us demonstrate, the trustees' section 8(d) position raises new legal questions which require distinct arguments regarding the scope and applicability of that section.

The exceptions to the rule that issues not considered in the district court may not be raised on appeal are designed to prevent what we have termed "manifest miscarriage[s] of justice," *McCaffrey v. Diversified Land Co., supra,* 564 F.2d at 1243-44. The trustees have not demonstrated that consideration of their new theory is called for either by the exceptions to the rule or by the principle which lies behind them. The question is not preserved for appeal under these circumstances.

III

The trustees' second contention is that the district judge improperly construed the short form agreement. While both parties contend that the agreement is unambiguous, each contends for an interpretation favorable to its own position. As observed earlier, the district judge concluded that Article V of the short form agreement controlled the termination of that agreement. He ruled that, pursuant to the terms of

Article V, significant modification of the original MLA terminated that agreement and, consequently, the short form agreement, as well.

Article V of the short form agreement states:

> This Agreement shall become effective as of the date shown above and *shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,* unless either party shall give written notice to the other party, at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.

(Emphasis supplied.) The trustees argue that Article V is modified by Article II of the short form agreement, which provides in part:

> The EMPLOYER, not being signatory to any recognized Operating Engineers' multiple-employer agreement, hereby agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed as recognized, modified and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group.

Specifically, the trustees suggest that Article II effectively continues the short form agreement in full force and effect even in the face of a modification of the MLA. Coughlin counters that Article II is "jurisdictional," and speaks only to possible modifications of territorial and jurisdictional assignments as regards coverage of particular work units by various collective bargaining agreements.

The district judge apparently agreed with Coughlin's position, for he did not make any reference to Article II in his

findings of fact and conclusions of law. We cannot find fault with the district judge's interpretation of the contract. Article V is clear. While Article II may not be as clear, it is strongly suggestive of the interpretation favored by Coughlin. Indeed, we find no reason to believe that Article II has any bearing on Article V, which the trustees concede is the termination clause of the agreement. Article II speaks of "multiple-employer agreements applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed *as recognized, modified and renewed* from time to time . . . ." (Emphasis supplied.) Article V speaks of the short form agreement continuing "in effect for *the same term* as the applicable multiple-employer labor agreements and *for any renewals or extensions thereof.* . . ." (Emphasis supplied.) The terminology is quite different. Moreover, it may reasonably be inferred that the purposes of the clauses are distinct, for they are located in different portions of the agreement, and neither clause makes any reference to the other. We agree with the district judge that the agreement "[does] not appear to be unclear in . . . intent or effect." Indeed, where the agreement construed otherwise, Coughlin would, so to speak, be purchasing "a pig in a poke." He would be bound by the terms of any new MLA, no matter how different the terms of the modified agreement from those of the original, and although he had no part in negotiations for that new agreement.

While, as the trustees suggest, Coughlin could have given 60 days' notice prior to termination of the original MLA, this would require him to take preemptive action, even if he is satisfied with the terms of the original agreement and hopes that it is renewed. It seems more reasonable, as the district judge found and as the clear language of Article V indicates, that the parties intended for the short form agreement to terminate if the original MLA was not renewed or

extended, and instead was modified. Although the parties could perhaps have more clearly expressed their intent, the district judge's construction of the short form agreement appears to reflect the parties' intent. Ordinarily, we will not set aside such an interpretation on appeal. *See Hart v. California Pac. Title & Trust Co.*, 136 F.2d 430, 432 (9th Cir. 1943).

IV

The trustees next contend that the district judge improperly concluded that the modified MLA was not a renewal or an extension of the original MLA, pursuant to Article V of the short form agreement. In this regard, the trustees suggest that the district judge incorrectly relied upon *East Bay Union of Machinists, Local 1304 v. Fibreboard Paper Prods. Corp.*, 285 F. Supp. 282 (N.D. Cal. 1968), *aff'd mem.*, 435 F.2d 556 (9th Cir. 1970).

In *Fibreboard*, the union sought damages for an alleged breach of a collective bargaining agreement. An important question was whether the notice of modification sent by the union to the employer, prevented the agreement from being automatically renewed. *Id.* at 283-84. The agreement contained a clause which provided that the agreement would be considered "renewed from year to year" unless one of the parties gave notice of intent to modify or to cancel. *Id.* at 284. The second paragraph of that clause provided that within 15 days of such reopening notice, the opening party would submit a list of proposed modifications, and that all other sections of the agreement would "remain in full force and effect." *Id.*

The district court concluded:

> To renew in the present context, means to "begin again" or "continue in force" the old contract. WEBSTER'S INTERNATIONAL DICTIONARY, Una-

> bridged, p. 2109 (2d ed. 1950). Once one of the parties has stated his desire to modify the *old* contract, that contract cannot obviously be "renewed," since there would in effect be a *different* or *new* contract. This is the clear meaning of the first paragraph of the [clause].

Id. at 287 (emphasis in original). The court also decided that the language of the second paragraph of the clause, regarding terms remaining in "full force and effect," was intended by the parties to limit the scope of negotiations prior to termination of the agreement, as determined by the first paragraph of the clause. *Id.*

The trustees contend that *Fibreboard* is not authority here because, while notice was given in that case, neither party to the short form agreement before us here gave notice to the other. This argument misses the point. The short form agreement at issue here referred to "renewals or extensions" *of the MLA*, not of the short form agreement.[1] In this case, notice was given pursuant to the terms of the MLA. Therefore, the district judge could properly look to *Fibreboard* for guidance.

The trustees' reliance upon *NLRB v. International Hod Carriers Local 300*, 287 F.2d 605 (9th Cir. 1961), and *Calhoun v. Bernard*, 333 F.2d 739 (9th Cir. 1964), *on appeal from remand*, 359 F.2d 400 (9th Cir. 1966), is to

---

[1]The trustees do not contend that the term "extension" used in the short form agreement means anything substantially different from the word "renewal." Indeed, it seems clear that both of these terms refer to some sort of revitalization of the original MLA.

no avail.[2] The trustees suggest that these cases demonstrate that an agreement containing an automatic renewal provision cannot be terminated without notice. We disagree.

Hod Carriers, which arose out of an unfair labor practice proceeding before the Board, rather than an action for breach of contract, only held that automatic renewal provisions were valid, and that pursuant to them, a contract could remain in effect for a significant period of time. 287 F.2d at 610. In that case, the short form agreement was "absolutely silent as to the existence or incorporation of . . . a master contract." *Id.* at 608. Rather, the agreement referred only "to 'the wage scales, classifications and working rules of the Union having jurisdiction,' " and similar general circumstances regarding union procedures and working conditions. *Id.* Moreover, because of the failure to make any reference to a master contract, the agreement was clear that it would "remain in effect until either party [gave] notice of intent to terminate." *Id.* Under those circumstances, renewal or modification of any master agreement was irrelevant to the life of the short form agreement then at issue.

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[2]Subsequent to submission of this case for decision, we decided *Waggoner v. C & D Pipeline Co.*, No. 77-3949 (9th Cir. July 24, 1979). In *Waggoner*, C & D Pipeline Company had signed only a short form agreement, which incorporated the terms of a master agreement. Subsequently, the master agreement was amended. While we implicitly held that the short form agreement before us there continued in force despite the amendment of the master agreement, and that the terms of the amended master agreement were incorporated into that short form agreement, we do not find that case dispositive.

In *Waggoner*, the parties apparently did not raise, and certainly we never considered, the question whether the short form agreement at issue there could or would terminate upon notice of intent to seek amendment of the relevant master agreement. Most important, however, we cannot be certain that the termination clause of the short form agreement in *Waggoner* is identical or even similar to the termination clause of the agreement before us here.

The circumstances of the *Calhoun* cases are also distinguishable from those before us here. Quite apart from blindly binding himself to unknown future agreements, the employer there "was informed that, by executing [the short form agreement], he was bound by the 1954 master agreement and the 1957 and 1959 amendments." 359 F.2d at 401. Moreover, the short form agreement there plainly provided (after elimination of a typographical error) that the employer would be bound by the master agreement and "any modification or changes" therein. *See* 359 F.2d at 401; 333 F.2d at 740.

V

Finally, contrary to the Union's contention, Coughlin's decision to provide contributions to the Union after July 1, 1969 (the termination date of the original MLA), pursuant to the terms of the new, modified MLA, does not demonstrate that Coughlin was bound by or believed that it was bound by the terms of the new MLA. Certainly, this is not sufficient to demonstrate that the district judge erroneously construed the agreement.

VI

Therefore, the district judge did not err in concluding that the short form agreement between Coughlin and the Union terminated with the termination of the original MLA, July 1, 1969.

AFFIRMED.

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Joseph H. Seymour, Trustee, et al., Plaintiffs, vs. Coughlin Company, a California corporation, and D. W. Coughlin, dba Coughlin Company, Defendants. No. CV 75-1035-EC.

Filed: Oct. 8, 1976.

Motions by both parties for summary judgment were heard on September 21, 1976. The defendant's motion was granted and the Court now makes its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. Plaintiffs and their successors are the Trustees of the Operating Engineers Health and Welfare Fund, the Operating Engineers Pension Trust, the Operating Engineers Vacation-Holiday Savings Trust and the Operating Engineers Journeyman and Apprentice Training Trust (hereafter Trustees).

2. Defendant Coughlin Company (hereafter Coughlin) is a California corporation which was incorporated in 1953. The present sole stockholder is Patrick J. Coughlin, son of D. W. Coughlin.

3. On August 3, 1967, defendant Coughlin, through its president and sole stockholder, D. W. Coughlin, executed a written short-form Collective Bargaining Agreement with the International Union of Operating Engineers, Local Union No. 12 (hereafter Local 12). Coughlin's agreement incorporated by reference the terms and conditions of a multiple-employer Collective Bargaining Agreement, commonly known as the Master Labor Agreement (hereafter MLA), which was negotiated between Local 12 and the Contractor's Associations (hereafter Contractors) and bound

Coughlin to the 1965 MLA for the term of said MLA 1965-1969 as provided in Article V of the short-form Agreement.

4. The Master Labor Agreement in effect on the date Coughlin executed the short-form Agreement continued in effect by its terms until July 1, 1969. Coughlin was not a party to the Master Labor Agreement.

5. On or before 60 days prior ot July 1, 1969, Local 12 gave written notice to the Contractors, in accordance with Article XIV of the MLA, of its desire to negotiate modifications to the terms of the MLA. Neither Local 12 nor Coughlin has given written notice to the other party of a desire to terminate or modify the short-form Collective Bargaining Agreement between them.

6. That the Southern California Chapter of the Associated General Contractors of America, Building Contractors Association of California, Inc., Engineering and Grading Contractors Association, Inc., and Home Builders Association, collective bargaining representatives for the contractors, and the International Union of Operating Engineers, Local Union No. 12, affiliated with the Building and Construction Trades Department, AFL-CIO, entered into a new and different Master Labor Agreement for the period 1969-1974 which substantially changed, modified and amended the prior Master Labor Agreement of July 1, 1965, effective for the period 1965-1969.

7. After July 1, 1969, Coughlin requested that Local 12 dispatch a workman to Coughlin, and Coughlin thereafter reported hours of employment and paid fringe benefit contributions to the Trustees for the period October-December, 1969, on behalf of that workman in accordance with the provisions of the Master Labor Agreement 1969-74, then in effect.

8. Any Finding of Fact which is, in effect, a Conclusion of Law shall be so deemed and any Conclusion of Law which is, in effect, a Finding of Fact shall be so deemed.

CONCLUSIONS OF LAW

1. That the new Master Labor Agreement 1969-1974, which became effective July 1, 1969, terminated and supplanted all previous Master Labor Agreements up to and including June 30, 1969.

2. That because of the implementation of the new MLA dated July 1, 1969, Coughlin's obligation under the MLA dated July 1, 1965, made binding by Article V of the short-form Collective Bargaining Agreement executed by D. W. Coughlin on behalf of Coughlin Company on August 3, 1967, was thereby terminated.

3. That all obligations of Coughlin Company to pay benefits to Local 12 Operating Engineers Journeyman and Apprentice Training Trust, Health and Welfare Fund, Pension Trust, and Vacation-Holiday Savings Trust, under the MLA 1965-69, were terminated as of July 1, 1969.

4. That Coughlin Company, subsequent to July 1, 1969, had no duty, obligation, confidential relationship or fiduciary duty, under the short-form Agreement to report any employees or any hours worked by any employees to Local 12 of the Operating Engineers, or any Trusts of the Operating Engineers.

5. No notice having been given by either party to the short-form Agreement to terminate or modify it, that Agreement was effective by the provisions of its Article V for the term of the MLA 1965-69 and any "renewals or extensions" thereof. The MLA 1965-69 was *not extended or renewed* under the continuance from year to year provisions of Article XIV of the MLA 1965-69, or otherwise. The MLA for 1969-1974 was a *different* or *new* agreement and, therefore,

the short-form Agreement terminated July 1, 1969. *East Bay Union of Machinists, Local 1304 vs. Fibreboard Paper Products Corp.*, 285 F. Supp. 282, 287 (N.D. Cal. 1968), Affrm'd 435 F.2d 556 (9th Cir. 1968); *McKeon v. Giusto*, 280 P.2d 782, 783-84 (Cal. 1955). The 1969-74 MLA was the result of negotiations in accordance with Article XIV of the 1965-69 MLA to "change, modify or amend," thus terminating the 1965-69 MLA. The new MLA 1969-74 was therefore not an "extension" or "renewal" of the old Agreement. The agreements involved do not appear to be unclear in their intent or effect but, if so, the interpretation should be most strongly against the draftsman, in this case Local 12. California Civil Code 1654; *County of Alameda v. Southern Pacific Company*, 11 Cal.Rptr. 751, 757 (Cal. 1961).

6. Based on the Findings of Fact and Conclusions of Law heretofore enumerated, defendant Coughlin Company is entitled to summary judgment.

DATED: Oct. 8, 1976.

/s/ E. Avery Crary,
E. AVERY CRARY
Senior United States District Judge

APPENDIX C.

Judgment Granting Motion for Summary Judgment.

United States District Court, Central District of California.

Joseph H. Seymour, C. Wm. Burke, Richard L. Corbit, John L. Connolly, Harold Edwards, Howard C. Dennis, Donald E. Mier, Alexander Rados, William Schmidt, William C. Waggoner, Jerald B. Laird and Richard Gannon, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Joseph H. Seymour, John L. Connolly, Richard L. Corbit, C. V. Holder, Harold Edwards, Howard C. Dennis, Donald E. Mier, James J. Kirst, William C. Waggoner, John C. Maxwell, C. William Burke, Richard Gannon, Kenneth J. Bourguignon and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Joseph H. Seymour, Howard C. Dennis, Richard L. Corbit, C. William Burke, Harold Edwards, Alexander Rados, Donald E. Mier, C. Irwin T. Johnson, William C. Waggoner, James J. Kirst, Richard Gannon and Jerald B. Laird, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Joseph H. Seymour, Alexander Rados, Richard L. Corbit, William Schmidt, Richard Gannon, Howard C. Dennis, Jerry Trent, Robert R. Moodie, Alan Roberts, C. Irwin T. Johnson, A Paul Schenk and Harold Edwards, each in his respective capacity as Trustee of the Southern California Operating Engineers Apprentice Training Trust, Plaintiffs, vs. Coughlin Company, a California corp., and D. W. Coughlin, dba Coughlin Company, Defendants. No. CV 75-1035-EC.

FILED: Oct. 8, 1976.

This cause came on regularly for hearing on September 21, 1976, in Courtroom No. 1 of the above-entitled Court before the Honorable E. Avery Crary, Senior United States

District Judge, presiding, on defendant Coughlin Company's motion for summary judgment, plaintiffs appearing by Timothy P. Sullivan and defendant Coughlin Company appearing by Jackson E. Chandler, and the cause having been argued and submitted for decision and the Court having caused to be made and filed its written Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED and DECREED that plaintiffs Joseph H. Seymour, et al., take nothing by their complaint from defendant Coughlin Company, that the complaint is hereby dismissed as to Coughlin Company and that the defendant Company recover from plaintiffs its costs of suit.

DATED: Oct. 8, 1976.

/s/ E. Avery Crary,
E. AVERY CRARY,
Senior United States District Judge.

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Joseph H. Seymour, etc., et al., Plaintiffs-Appellants, vs. Coughlin Company, a California corporation, Defendant-Appellee. No. 76-3701.

FILED: Dec. 28, 1979.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 79-1491
October Term 1979

JOSEPH H. SEYMOUR,
C. WILLIAM BURKE,
RICHARD L. CORBIT, et al.,

Petitioners,

vs.

COUGHLIN COMPANY,
A California Corporation,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPREME COURT
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JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, et, al.,

Petitioners,

vs.

COUGHLIN COMPANY, A CALIFORNIA CORPORATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justice of The Supreme Court of The United States:

Respondent, THE COUGHLIN COMPANY, herein opposes and prays the court to deny the issuance of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit entered October 5, 1979 in case no. 76-3701 of that Court.

Opinion Below

The statement of petitioners as to the opinion below by reference to Appendices A, B and C of the petitioner's brief is essentially correct.

Jurisdiction

The respondent has no objection to the petitioners' basis of jurisdiction.

Questions Presented

The petitioners raise two questions in their brief. The petition fails to present the threshold question:

1. May the appellant to the Ninth Circuit Court of Appeals raise a theory on which to base liability of the

respondent that was not presented to the District Court until after the motion for summary judgment was granted in favor of the respondent?

2. If the petitioners can raise a theory of liability based on section 8 (d) of the National Labor Relations Act, not presented to the District Court prior to its ruling on summary judgment, is a civil lawsuit the proper forum to air an unfair labor practice as a basis for liability?

3. Can a contractor signatory to a Short-form (Collective Bargaining Agreement) be bound to that agreement or the Master Labor Agreement (hereinafter referred to as "MLA"), which the Short-Form incorporates after the Union's bargaining representative and employer group have negotiated a new MLA?

Statutes Involved

Respondent contends that there are no statutes involved in the disposition of this case, but agrees that the statement of **Section 8 (d) of the National Labor Relations Act, 61 Stat. 142, 143, 29 U.S.C. 158 (d),** in the petitioners' brief is an accurate statement of that section.

Statement of the Case

The following facts come from petitioners Appendix "A" to the petitioner.

Respondent Coughlin is a California corporation which

which was incorporated in 1953, the original stockholder being D.W. Coughlin, father of the present sole stockholder, Patrick J. Coughlin.

D.W. Coughlin, President of Coughlin Company, a corporation, on August 3, 1967, executed a written Short-Form Collective Bargaining Agreement with the International Union of Operating Engineers, Local Union No. 12. No other Short-Forms or Master Labor Agreements were entered into between Coughlin Company, and International Union of Operating Engineers, Local Union No. 12. The Short-Form Agreement entered into in 1967 incorporated by reference the terms and conditions of a multiple-employer collective bargaining agreement, commonly known as the Master Labor Agreement. That Master Labor Agreement, hereinafter referred to as "MLA" was negotiated between Local 12 and a contractors-employers bargaining group.

Article V of the Short-Form Agreement is set out as follows, as the duration clause of that Short-Form:

> "This agreement shall become effective as of the date shown above and **shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,** unless either party shall give written notice to the other party at least sixty (60) days prior to the termination date of appropriate multiple-employer agreement, of its desire to terminate." (RA: 154). (Emphasis added).

This Article V in one paragraph covers the portion of

the agreement between the Union and Coughlin that can be referred to as the **duration** of the agreement.

On or before 60 days prior to July 1, 1969, Local 12 gave written notice to the Contractors Associations, in accordance with Article XIV of the MLA, of its desire to negotiate modifications to the terms of the MLA. Neither Local 12 nor Coughlin has given written notice to the other party of a desire to terminate or modify the short-form Collective Bargaining Agreement between them.

Thereafter, the Union and the Contractors' Association negotiated a new MLA which substantially changed, modified, and amended the prior MLA.

In 1975, the Trustees, petitioners herein, filed the current action to recover for alleged benefits obligated on behalf of the hours of Patrick J. Coughlin, the sole stockholder and operator of Coughlin for hours worked during the time period subsequent to June 30, 1969 through the end of 1974.

Coughlin denied liability to the complaint and raised eleven affirmative defenses, including a defense that the contract terminated and was cancelled in 1968. After particular pleadings in the case, the parties prepared a pre-trial conference order and agreed that each should enter cross-motions for summary judgment and have them filed in the court below. The primary argument of Coughlin in the motion for summary judgment was that the contract terminated as a matter of law under the terms of Article V of the Short-Form Agreement when the MLA incorporated in the Short-Form was terminated by the parties to

the MLA.

The Trustees had filed their own motion for summary judgment, and responded to Coughlin's motion for summary judgment. Up until the time of the hearing on the cross-motions for summary judgment both parties dealt with the issue as to whether the contract terminated by operation of law as a result of the actions of the parties to the MLA. The court ruled in favor of Coughlin that, in fact, the contract had terminated in 1969. The District Court allowed the plaintiff, petitioner herein, seven days with in which to file objections to the findings of fact and conclusions of law proposed by Coughlin. The Trustees, instead of objecting to the District Court's findings of fact and conclusions of law, raised a new theory of liability on which it felt Coughlin should be obligated under the terms of the Short-From Agreement. The new theory was based on section **8 (d) of the National Labor Relations Act, 29 U.S.C. 158 (d).** Up until that time, the plaintiff had never raised this issue in his pleadings or discussions with Coughlin, or the District Court. The District Court proceeded to grant its decision on summary judgment in favor of Coughlin based on the law presented to it in briefs and arguments.

The petitioners appealed the case to the Ninth Circuit Court of Appeals which affirmed the decision of the District Court stating that the petitioners had failed to timely raise the issue of 8 (d) in the District Court. The Ninth Circuit Court of Appeals agreed with the interpretation given the Short-Form Agreement and Article V, and thereafter affirmed the District Court's decision.

Argument in Opposition to Writ

1. THE NINTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT PROPERLY DISREGARDED THE NEW THEORY OF LIABILITY NOT PRESENTED PRIOR TO THE MOTION FOR SUMMARY JUDGMENT.

The respondent herein agrees with the Ninth Circuit's application of **United States v. Patrin,** 535 F. 2d 708, Ninth Circuit (1978). The petitioners mistakenly imply that the case was the only basis of the decision. The Ninth Circuit Court of Appeals, at 609 F. 2d 348, states:

> "As a general rule, a Federal appellate court does not consider an issue not passed upon below." **United States v. Patrin, 575 F. 2d 708,** below." **United States v. Patrin,** 575 F. 2d 708, 712 (9th Cir. 1978) (quoting **Singleton v. Wulff,** 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed 2d 826 (1976). Accord, e.g. **Roberson v. United States,** 382 F. 2d 714, 718 (9th Cir. 1967). See also **McCaffrey v. Diversified Land co.,** 564 F. 2d 1241, 1243-44 (9th Cir. 1977) (per curiam). While we have recognized a number of exceptions to this rule, none is applicable here."

The Court obviously had reference to a large body of law, including the United States Supreme Court in **Singleton v. Wulff,** 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed 2nd 826 (1976) as authority that appellate court will

not consider issues raised for the first time on appeal, and not decided by the trial court below. The motions for summary judgment in a District Court were cross-motions determined after pre-trial conference. The plaintiff had full opportunity to present all arguments to the court, and must have been aware that a ruling on the motion for summary judgment in favor of the defendant would include a judgment against the plaintiff.

If the petitioners' argument were to prevail in the petition for writ herein, the result would be that the purpose of summary judgment as a time saving device would be undermined. The plaintiff could present a new argument on one theory, lose and then consume the court's and the litigant's time and labor to propose a new argument. Respondent urges the court to disallow the petitioners' attempt to have the Supreme Court review what the other courts, the District Court, and the Ninth Circuit Court of Appeals have justifiably refused to rule on.

2. EVEN IF THE COURT ALLOWED THE NEW THEORY OF RECOVERY SECTION 8 (d) OF THE NATIONAL LABOR RELATIONS ACT SHOULD NOT BE APPLIED.

In 1951 the Sixth Circuit Court of Appeals in **International Union of Operating Engineers vs. Dahlem Construction Company,** 193 F. 2d 470, stated:

"[4,5] § 158, 29 USCA § 158 does not apply to an

action for damages under § 185, 29 USC, 29 USCA § 185. The two statutes are included in totally separate divisions of the National Labor Relations Act, § 158 being found in subchapter II — National Labors Relations Act, and § 185 being include in subchapter IV, Liabilities of and Restrictions on Labor and Management. Section 158 in its original form was entitled, "Unfair labor practices by employer defined", and included five paragraphs defining unfair labor practices which are written in the present statute. New definitions of unfair labor practices were included in the amended act and approximately two-thirds of § 158, and the heading of the section is "Unfair labor practices." No provisions in § 158 relate in any way to § 185, the heading of which is "Suits by and against labor organizations — Venue, amount, and citizenship." The wording of the statutes strongly support the conclusions that even if the appellant had complied with § 158 (d), it would receive no immunity from a suit for damages for breach of contract under § 185."

The holding is quite clear that there are two separate forums. One is "remedying of unfair labor practices" pursuant to activities that are noted in the National Labor Relations Act (hereinafter NLRA), and proceed before the National Labor Relations Board (hereinafter NLRB). The Federal Courts are used only to enforce these administrative decisions. The other type of forum is that involved in the

present case. A third-party beneficiary to the Collective Bargaining Agreement seeks a money damages recovery in a civil lawsuit under Section 301 of the NLRA. As the U.S. Supreme Court stated in the case of **Local 174, Teamsters Union vs. Lucas Flower Company,** 369 U.S. 95, 101, 82 S. Ct. 571, 7 L. Ed. 593 (1962):

> "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices, as such."

See, also, **General Warehousemen, etc., vs. Standard Brands** (1977), 560 F. 2d 700, 703.

A further, recent case of the Ninth Circuit Court of Appeals is especially persuasive in the disposition of this argument. On August 24, 1979, the Ninth Circuit Court of Appeals decided the case of **William C. Waggoner, et al., etc., vs. R. McGray, Inc., O'Shaughnessy Construction Company, Tri-Central Construction Company, and Vernon Houghton, Appellees,** 607 F. 2d 1229 (Ninth Circuit 1979). The holding of that case in on page 1231, as follows:

> "We hold that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in section 301 actions."

The Ninth Circuit relied heavily on the language of the

U.S. Supreme Court in **San Diego Building and Trades Council vs. Garmen,** (1959), 359 U.S. 236, and **Sears, Roebuck & Company vs. Carpenters** (1978), 436 U.S. 180. The theory of primary jurisdiction of the NLRB to decide unfair labor practices was utilized by the court. It reasoned that when a party to a Section 301 suit for damages attempts to raise an issue of an unfair labor practice as a defense, the court should resolve the contractual issue and leave the unfair labor practice to the proper forum. The court states, at page 1236:

> "Appellee's defense that the contract involved an unfair labor practice in violation of section 8 (e) belonged before the NLRB, however, and not before the District Courts."
>
> "The appellees were the only parties who could have invoked the jurisdiction of the NLRB to hear their unfair labor practice charge. Their failure to bring the matter before the Board does not justify the District Court's assertion of jurisdiction to decide the unfair labor practice claim.

(Cf., **Sears, Roebuck & Co., vs. Carpenters, supra,** 436 U.S. at 202-03 (primary jurisdiction rationale not sufficient to preempt a court's jurisdiction when party whose claim would be preempted could not have presented unfair labor practice to NLRB.) To hold otherwise would be to encourage parties to circumvent the congressionally-established scheme for resolution for unfair labor practice disputes by the NLRB, the District Courts

should have decided the contract issues presented in the Trustees' Section 301 action without reference to the appellee's unfair labor practice defense."

It is clear that the Ninth Circuit, in conformance with and based upon the Supreme Court decisions, has ruled that in Section 301 suits the courts are competent to determine the rights and liabilities of the parties based on the collective bargaining agreement. Defenses or assertions raised on theories that a contract right should be decided as a result of whether an unfair labor practice has occurred should not be raised in such suits. If a party is aggrieved by an unfair labor practice, the party should proceed and file an unfair labor practice charge in the proper forum — the NLRB. It should be noted that the very short statute of limitations provided for in the NLRA, that is, six months, 29 USC 160 (b) would be extended by allowing a party to raise an unfair labor practice charge in a Section 301 suit. Such a result would be contrary to the obvious intent of Congress in providing the short statute of limitations.

There is little question that the plaintiffs-petitioners' rights arise out of the collective bargaining agreement signed in 1967 between Coughlin and Local Union 12. The plaintiffs-petitioners are third-party beneficiaries to that contract and certainly take it subject to any defenses that the defendant-employer would have against the Union. The issue of termination should be determined between the employer and the petitioners as if the petitioners stood in the same place as the Union. Based on law in the Ninth Circuit, and the laws stated by the United States Supreme

Court, the respondent herein urges the court to not apply the unfair labor practice charge in deciding the contractual issues of this case, just as they would deny such an opportunity to the union.

3. THE UNIONS ARE NOT PREJUDICED BY THE RULING BELOW.

The petitioners argue in their brief that by the Ninth Circuit Court of Appeals' ruling below, the Union will be prejudiced by requiring them to resign the Short-Form Contractor each time a new MLA is negotiated. Such an obligation should not be that shocking. The Union business managers thought it sufficiently important to go to the effort to first sign up the Short-Form contractor, Coughlin in this case. It doesn't seem that unusual for them to be interested enough to sign up the contractor again when the terms change as dramatically as they can in a new collective bargaining agreement. The Short-Form contractor often pays substantial benefit payments to the trust each year. It would be unbusinesslike for a contractor to complete one project for an owner and then just proceed on the next project without a new contract because of the time consuming activity needed to get a new contract signed. To place such a responsibility on the Union is not that burdensome.

The ruling of the courts below leaves intact the intent of the parties expressed in the contract. The terms and respective obligations are set out for a particular time

period. If neither party does anything — the same terms are renewed for one-year periods. Each party still knows what to expect. If the terms are altered, however, neither party knows what to expect. As the Ninth Circuit stated below, at 609 F. 2d page 350:

> "Indeed, were the agreement construed otherwise, Coughlin would, so to speak, be purchasing a 'pig in a poke'. He would be bound by the terms of any new MLA, no matter how different the terms of the modified agreement from those of the original, and although he had no part in the negotiations for that new agreement."

4. THE ACTIONS OF THE PARTIES TO THE MLA-INCORPORATED IN THE SHORT FORM BY REFERENCE-PRECLUDES THE AUTOMATIC RENEWAL PROVISIONS OF THE SHORT-FORM

The respondent herein feels that the subject presented by Question 4 goes much farther to the merits of the appeal than is requested in an opposition to a petition for writ of certiorari. However, the respondent presents below a brief argument supporting the Ninth Circuit Court of Appeals decision as found in Appendix A to the petitioners' petition.

The collective bargaining agreement which underlies the action was one presented by the Union to the employer. The language in Article V of the Agreement is set out below:

"This Agreement shall become effective as of the

date shown above and **shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,** unless either party shall give written notice to the other party at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate." (Emphasis added).

The trial court and then the Ninth Circuit Court of Appeals, based on arguments presented, have held in this case that when a contract is for a particular duration (of the applicable MLA) or for any renewals or extensions thereof, then only a renewal or extension - not a modification - will allow the automatic renewal procedure to operate. The District Court and the Ninth Circuit Court of Appeals granted their decision based primarily on the case of **Eastbay Union of Machinists, Local 1304 vs. Fibreboard Paper Products Corp., 285 F. Supp. 282, aff'd. 435 F. 2d 556, Ninth Circuit 1970.** In that case, the Ninth Circuit, for the reasons stated in the trial court's decision, interpreted what renewals and extensions means in a labor relations context. The trial court and the Ninth Circuit, based upon the evidence provided by both parties, ruled that the notice given to the parties to the MLA precluded the renewal or extension of the old contract. The Ninth Circuit Court of Appeals' reasoning as shown in Appendix A to petitioners' brief is sound and stands on its own.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April , 1980.
Respectfully submitted,

WALKER W. DOWNS of
DOWNS, OBERG & WHITE

By:_____
Walker W. Downs
Attorneys for Respondent

PROOF OF SERVICE

State of California)
ss
County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action: My business address is 612 N. Bush Street, Santa Ana, California 92701.

I served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the interested parties in said action, by placing a true copy in each of two sealed envelopes with postage thereon fully paid, in the United States mail at Santa Ana, California to:

Wayne Jett
3055 Wilshire Boulevard
Suite 420
Los Angeles, California 90010
(213) 380-2082

Reich, Adell, Crost & Perry
A Professional Law Corporation
501 Shatto Place, Suite 100
Los Angeles, California 90020
(213) 386-3860

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on April 23, 1980 at Santa Ana, California.

JACK GALLAGHER

Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1491

JOSEPH H. SEYMOUR, *et al.*, etc.,

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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May 1980.

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IN THE

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Respondent.

PETITIONERS' REPLY BRIEF.

Petitioners, the joint labor-management boards of trustees of the Operating Engineers Trusts (''Trustees''), file this reply brief to address an argument first raised in the respondent Coughlin Company's (''Coughlin'') brief in opposition to the petition.

Coughlin contends that §8(d) of the National Labor Relations Act [29 U.S.C. §158(d)] cannot be considered in the context of a §301(a) suit to enforce a collective bargaining agreement, because §8(d) involves ''whether an unfair labor practice has occurred'' and can be considered only in proceedings before the National Labor Relations Board. (Op. Br., pp. 8-13).

The Trustees do not seek a holding that an unfair labor practice has occurred or a remedy for such a statutory vi-

olation.[1] The petition seeks an interpretation of the collective bargaining agreement "in the light of the law relating to it when made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 279, 76 S.Ct. 349, 356 (1956). This Court has held that the substantive rules of contract interpretation to be applied in suits for enforcement of collective bargaining agreements under §301(a) are federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, 77 S.Ct. 912, 918 (1957). The *Textile Workers* decision of this Court further described the source of federal substantive law in §301(a) cases as follows:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, 353 U.S. at 457, 77 S.Ct. at 918.

Section 8(d) is a part of "the penumbra of express statutory mandates" to be considered in fashioning the rules of contract interpretation that will best effectuate the federal policy.

The court of appeals in *International Union of Operating Engineers, Local No. 181 v. Dahlem Construction Company*, 193 F.2d 470 (6th Cir. 1951), cited by Coughlin, actually did examine the provisions and policy of §8(d). The Sixth Circuit held first (193 F.2d at 473) that the union's efforts to terminate the collective bargaining agreement had not complied with the requirements of §8(d), and second

---

[1]Section 8(d) does not specify or prohibit an unfair labor practice. Unfair labor practices are set forth in §158(a), (b) and (e).

(193 F.2d at 474-75) that the collective bargaining agreement remained in full force and effect because the union's proposed interpretation of the agreement "would distort the express terms of the statute [§8(d)] and run counter to several decisions construing it."

Coughlin also cites the case of *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), a case in which the Trustees of the Operating Engineers Trusts were appellants and the prevailing parties on appeal. In *McGray*, the employers sought to defend against enforcement of the collective bargaining agreement by asserting that a particular clause of the agreement violated the unfair labor practice provisions of §8(e) of the Act and by requesting that the district court declare the clause to be null and void. The court of appeals held that the alleged violation of §8(e) was within the exclusive primary jurisdiction of the National Labor Relations Board, and that federal district courts should proceed in §301(a) suits to enforce the contract rights of parties without reference to unfair labor practice defenses. The holding of the court of appeals in *McGray* is consistent with and required by the previous decisions of this Court in *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161 (1953); *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267 (1962); and *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971). The *McGray* decision and the previous decisions of this Court support, rather than detract from, the jurisdiction of federal courts to proceed with adjudication of suits under §301(a). Such suits require application of federal rules of interpretation, including the rule that collective bargaining agreements will be interpreted "as a whole and in the light of the law relating to it when made", and such additional rules of interpretation

as are necessarily fashioned from the penumbra of federal labor statutory mandates.

The aim of §8(d) is "to bring about the termination and modification of collective bargaining agreements without interrupting the flow of commerce or the production of goods. . . ." *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company*, 404 U.S. 157, 187, 92 S.Ct. 383, 402 (1971). The court of appeals refused to consider this legislative aim, and refused to consider the uncontroverted extrinsic evidence that Local 12 and Coughlin intended the short form agreement to remain in effect with the incorporated terms of the modified Master Labor Agreement. The court of appeals applied a rule of law disfavoring such an interpretation and causing automatic termination of the agreement, contrary to the express provisions of §8(d), in order to protect Coughlin from being bound to the modified Master Labor Agreement because "he [Coughlin] had no part in negotiations for that new agreement". (*Pet.App.* A, p. 6.)[2] That rule of contract interpretation is importantly erroneous, as was the granting of summary judgment against the Trustees despite the uncontroverted extrinsic evidence of contractual intent. The opposing brief makes no reference to the extrinsic evidence of contractual intent or to the propriety of summary judgment in light of that evidence.

---

[2]Thousands of employers regularly bind themselves to prospective collective bargaining agreements under circumstances in which the individual employer will have no direct participation in the negotiations and little or no control over the final terms of agreement. See, e.g., *Bonanno Linen Service, Inc.* (*Teamsters Local 25*), 243 NLRB No. 140, 102 LRRM 1001 (1979). From Coughlin's point of view, the short form agreement accomplished substantially the same purpose and Coughlin avoided the cost of paying membership dues in an employer association.

Conclusion.

The petition for a writ of certiorari should be granted.

May, 1980.

Respectfully submitted,

WAYNE JETT,

Counsel for Petitioners.

MOTION FILED
APR 8 1980

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1491

JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, *et al.*,

(Complete Title on Inside Cover)

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

PETITION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS
AND
BRIEF OF AMICUS CURIAE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12.

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Respondent.

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Respondent.

PETITION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

International Union of Operating Engineers, Local Union No. 12 ("Local 12") applies for leave to file with the Court the attached brief as amicus curiae in support of the petitioners, on the following grounds:

1. Local 12 is the labor organization with whom respondent Coughlin Company executed the "short form" collective bargaining agreement which was in dispute before, and interpreted by the United States Court of Appeals for the Ninth Circuit.

in Southern California and Southern Nevada, many

2. Local 12 has approximately 5,000 short form agreements with employers, and represents approximately 25,000 workers in the construction industry of whose livelihoods will be affected by a ruling in

the questions presented by the petitioners, in that the enforceability of the short form agreement may depend upon the Ninth Circuit's ruling.

3. Counsel for Local 12 has examined the pleadings, the relevant statutes and the briefs, and is familiar with the issues involved in this case and the scope of their presentation.

4. Local 12 shall argue in its brief that the decision of the Court of Appeals may cause widespread labor strife and have a detrimental economic effect in the construction industry. Local 12 shall argue that for these reasons, and because the decision is contrary to federal labor law, certiorari should be granted.

5. Good cause exists for the late filing of Local 12's brief in that Local 12 was not a party to the underlying litigation or the appeal, and learned only through the recent receipt of a copy of the Petition for a Writ of Certiorari that the Petition was being filed.

WHEREFORE, Local 12 respectfully requests permission to file the attached brief as amicus curiae in support of the petitioners.

Respectfully submitted,

JULIUS REICH and
ALEXANDER B. CVITAN, Members of
REICH, ADELL, CROST & PERRY,
A Professional Law Corporation,

By JULIUS REICH,

Attorneys for International Union of Operating Engineers, Local Union No. 12, Applicant for Leave to File Amicus Curiae Brief.

IN THE

Supreme Court of the United States

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COUGHLIN COMPANY, a California corporation,

Respondent.

BRIEF OF AMICUS CURIAE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12.

Reasons for Granting the Petition.

The subject of the Court of Appeals' decision involves an important question of law with which this Court has never directly dealt; namely, whether a collective bargaining agreement may automatically expire by its own terms without the advance written notice required by Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d).

Because of the substantial impact of the decision on hundreds of thousands of workers whose terms and conditions of employment are governed by "short form" collective bargaining agreements, certiorari should be granted to settle the important issues of law presented by this case.

ARGUMENT.

THE HOLDING OF THE COURT OF APPEALS THAT A COLLECTIVE BARGAINING AGREEMENT MAY EXPIRE BY ITS OWN TERMS, WITHOUT PRIOR WRITTEN NOTICE, IS CONTRARY TO SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT AND MAY CAUSE WIDESPREAD LABOR UNREST.

1. The Decision of the Court of Appeals May Establish a Precedent Followed by Parties Throughout the Country.

International Union of Operating Engineers, Local Union No. 12 ("Local 12") has executed short form collective bargaining agreements with approximately 5,000 employers who are engaged in the construction industry in Southern California and Southern Nevada. By incorporating the terms of master labor agreements which were negotiated between Local 12 and various employer associations, these short form agreements establish the wages, hours and other terms and conditions of employment for over 25,000 workers.

Throughout the construction industry parties to these agreements have long understood that unless 60 days prior written notice is given, they are bound not only to the master labor agreement in effect at the time of execution of the short form agreement, but to each master labor agreement "as recognized, modified and renewed from time to time." This intent and common understanding is reflected in prior decisions of the Court of Appeals for the Ninth Circuit. *See, e.g., Seymour v. Hull & Moreland Engineering,* 605 F.2d 1105, 1108 (9th Cir. 1979); *Waggoner v. C & D Pipeline Co.,* 601 F.2d 456, 457 (9th Cir. 1979). Respondent Coughlin Company is the first employer to offer a contrary interpretation.

Short form agreements are by no means unique to Local 12. Indeed, the practice of entering into similar agreements in the construction industry extends nationwide. *See, e.g., International Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.,* 406 U.S. 487, 488, 92 S.Ct. 1710, 1711 (1972); *Ted Hicks & Associates, Inc. v. NLRB,* 572 F.2d 1024, 1026 (5th Cir. 1978); *Bugher v. Southland Fabricators & Erectors, Inc.,* 452 F. Supp. 870, 872 (W.D. La. 1978); *Construction & General Laborers Union, Local 1140 v. Sheesley-Winter Construction Joint Venture,* 421 F. Supp. 137, 138 (D. Neb. 1976).

Because of the widespread use of short form agreements, the decision of the Court of Appeals is significant to other parties than those immediately affected. Nor is its effect limited to the construction industry within the jurisdiction of the Ninth Circuit. Rather, for *any* Court of Appeals to hold, as the Court of Appeals for the Ninth Circuit has done here, that an employer's contractual obligations terminate without prior written notice, and that such termination is given retroactive effect, will create chaos where the parties believed they had negotiated labor peace.

2. The Decision of the Court of Appeals May Create Labor Unrest in the Construction Industry.

The decision of the Court of Appeals is that once the initial master labor agreement is modified, the short form agreements expire without notice. Even where the employer acts in compliance with the terms of the renewed or modified master labor agreement by making proper trust fund contributions on behalf

of employees, the agreement is still considered to have expired on the date of the renewal or modification.[1]

This concept flies in the face of Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d). *See Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 187, 92 S.Ct. 383, 401-02 (1971) ("the party desiring . . . termination is required to serve written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations").[2] Moreover, it conflicts with the national labor policy in favor of industrial peace. As this Court stated in *Pittsburgh Plate,*

> "[t]he conditions for . . . termination set out in [Section 8(d)] plainly are designed to regulate . . . terminations so as to facilitate agreement in place of economic warfare." *Ibid.*

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[1]Incredibly, in the view of the Court of Appeals such conduct in conformance with successive master labor agreements does not even raise an issue of triable fact relevant to the parties' intent. For this reason alone, Local 12 submits that the Court should grant certiorari to review the decision.

[2]The Court of Appeals' ruling that Section 8(d) was not timely raised before the District Court is incorrect. First, the District Court itself refused to make such a finding. Second, according to the local rules governing procedure in the District Court, the argument was timely raised. *See* Rule 7 of the United States District Court for the Central District of California which provides in part: "If objections to form *or substance* [of findings of fact and conclusions of law] are served and filed . . . the court may thereafter require counsel to appear for a hearing thereon or may sign the [findings of fact and conclusions of law] as prepared or as modified" (emphasis added). The petitioners did file timely objections *to the substance* of the District's Court tentative findings. If it had determined a need for a further hearing, the District Court could have requested argument from respondent. However, its failure to do so is certainly not a reflection on the timeliness of petitioners' arguments.

Far from furthering the goal of industrial peace, the decision of the Court of Appeals may have opened a Pandora's box, Local 12, once assured of relatively peaceful labor relations, is now uncertain of the status of 5,000 collective bargaining agreements and the terms and condition of employment of over 25,000 workers it represents. Other unions which have negotiated similar language in their short form agreements face this same uncertainty. Indeed, the relationships of countless employers and unions, and the status of their past and present contractual obligations, may now be in doubt. These doubts can be resolved by this Court now or they may be the subject of multitudinous litigation before the courts and the National Labor Relations Board in the future.

Also placed in jeopardy is the status of trust fund contributions made pursuant to those short form agreements which, under the Court of Appeals' view, expired long ago. These contributions would have been paid without the benefit of the statutorily required written collective bargaining agreement. *See* 29 U.S.C. §186 (c)(5)(B); *Walsh v. Schlecht,* 429 U.S. 401, 407, 97 S.Ct. 679, 684 (1977). Thus, the payment of fringe benefits to beneficiaries may be diminished and in some cases denied. *See Moglia v. Geoghegan,* 403 F.2d 110, 116 (2d Cir. 1968), *cert. denied,* 394 U.S. 919 (1969) (widow denied pension trust benefits where there was no collective bargaining agreement between contributing employer and union). Demands for reimbursement of the contributions, as well as claims by employees for fringe benefits to which they thought they were entitled, may be the cause of additional litigation.

This uncertainty and potential disruption in collective bargaining relationships exists simply because the Court of Appeals refused to apply Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d). Furthermore, it exists because the Court of Appeals refused to adhere to the fundamental legal principle that summary judgment may not be granted where there is raised a triable issue of fact.

Conclusion.

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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